No. 14893

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GUENITH OPAL BEEDY and CYNTHIA GUEN BEEDY, by his next friend, GUENITH OPAL BEEDY,
Appellant,

vs.

THE WASHINGTON WATER POWER CO., a Corporation,
Appellee.

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Appellee's Answer Brief

Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division

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INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

STATUTES AND COURT RULES

TEXTS

APPELLEE'S ANSWER BRIEF

JURISDICTION

This action was brought by Guenith Opal Beedy and Cynthia Gwen Beedy by her next friend, Guenith Opal Beedy, citizens and residents of the State of Texas, against the appellee, the Washington Water Power Company, a Washington corporation, having its principal place of business in Spokane County, Washington (TR. 3). The action was brought in the United States District Court for the District of Idaho, Northern Division, and was an action to recover damages for the death of George Beedy, husband of Guenith Opal Beedy and father of Cynthia Gwen Beedy, alleged to have been caused by the negligence of appellee, the Washington Water Power Company. The amount of the recovery sought was the sum of $200,000.00 (TR. 5), no part of which claim was admitted, but all liability was denied by appellee (TR. 24-26).

Jurisdiction of the District Court existed under Title 28, Sec. 1332, USC.

Appellants have appealed from the final judgment dated August 24, 1955, denying relief to plaintiff. Notice of Appeal was filed on September 8, 1955, and a copy of said notice was mailed to the attorneys for the defendant the same date (TR. 93, 96).

Jurisdiction of the United States Court of Appeals for the Ninth Circuit to review the case is believed to exist under Title 28, Sec. 1291 and 1294, USC, and Rule 73 of the Federal Rules of Civil Procedure.

COUNTER-STATEMENT OF THE CASE

On or about April 27, 1954, the Washington Water Power Company, hereinafter referred to as the Power Company, entered into a contract with the Lewis Construction Company, under the terms of which the Lewis Construction Company, hereinafter referred to as "Contractor," agreed to furnish all the equipment and perform all the work consisting of replacing conductors on an electric transmission line of the Power Company from the Company's substation at Government Gulch to the substation Burke in the State of Idaho, a distance of about 22.33 miles. This work included replacing present crossarms in poor condition, removing overhead ground wires on certain portions of the line, replacing a certain type of insulators with another type of insulators, replacing the copper conductor with aluminum conductor, and replacing guys or anchors or both, which had deteriorated. The Power Company, referred to in the contract as "Owner," supplied all line materials which were stockpiled at Wallace, Idaho (TR. 30, 31).

The transmission line being reconductered, was a heavy 110,000 volt main transmission line which passed over the top of a number of low-voltage electric distribution lines. It was agreed and understood by the Contactor that he would be responsible for restringing the conductor over these low-voltage distribution lines without turning off the electric current in the distribution lines. In the trade, this is referred to as "a hot crossing." The bid of the Contractor was based on

making all hot crossings (Tr. 111, 112). Making a hot crossing is a common operation, but making a hot crossing requires erection of a guard structure by the Contractor and this necessarily involved more time and work (TR. 67, 132, 145, 146, 156).

From the beginning of the work, it was definitely understood by the Contractor that the crossing where the accident occurred would have to be made hot because the Power Company felt it could not deprive its many customers, including a number of industries, who were dependent upon this particular distribution line, of power for the period of time necessary to make the crossing (TR. 111, 112).

On Thursday preceding the accident, a line crew working for the Contractor pulled out the old copper conductor which passed over this distribution line and replaced it with new aluminum wire. On the following Sunday, a crew, including decedent, was pulling the new wire up to proper tension. In so doing, they allowed some slack wire to run down a mountainside and the new conductor dropped into the distribution line, sending electricity through the new line and causing the death of George Beedy. A guard structure was erected at this particular crossing, but at the time of the accident it was not being used. Had the guard structure or any other suitable guard structure been used at the crossing, the accident would not have happened (TR. 120, 134, 150). The Power Company did, as the work progressed, in order to speed up construction and assist the Contractor, de-energize or kill as many of the distri-

bution lines as it could without seriously inconveniencing its customers (TR. 112, 113). The 13,000-volt distribution or feeder line involved in the accident supplied approximately 190 residential and commercial customers—4 mines, a mill, a meat-packing plant, and a lumber company; and there was no alternative source of electric power to supply these customers (TR. 79). Making the crossing required approximately seven hours' work on Thursday preceding the accident and about five hours' work on the Sunday of the accident (TR. 117, 118, 128).

It is conceded that the work being done was being done on the premises of appellee (TR. 85). Appellee, The Power Company, maintains crews on its own payroll for the construction and reconductoring of transmission lines and contracts out any excess work that it cannot handle with its own crews (TR. 65-69). The Idaho Power Company, a major utility in the State of Idaho, maintains the same practice; and in fact during the past three years has done all of its own construction work through its own crews (TR. 69-71). The same is true of the Utah Power and Light Company (TR. 71-74) and the Pacific Power and Light Company (TR. 75-78). In the public utility industry generally the construction and reconductoring of transmission lines is considered part of the business of the utility (TR. 67, 74).

SUMMARY OF ARGUMENT

The appellee's argument in this case may be divided into three main sections. Section I will show that there

was no disputed relevant fact and that it was proper for the Court to enter a summary judgment. Section II will show that viewing the contentions of the Appellants in the light most liberal and favorable to the Appellants would not as a matter of law justify submitting this case to a jury on the issue of negligence. Section III will show that the District Court properly granted summary judgment on the ground that under the Idaho Workmen's Compensation law, defendants stood in relation of employer to the decedent.

ARGUMENT

I

The argument of appellee that the acting District Judge overruled the District Judge's order of April 6, 1955 (TR 22, 23) need be noted but briefly. The District Judge's order of April 6, 1955, was predicated entirely upon the sufficiency of the Complaint to state a cause of action. Appellee made no attempt to move for summary judgment at that time, since the matter could be set for trial and disposed of at an early date. At the time set for trial, the matter was stricken from the trial docket at the last minute on Appellant's motion after appellee had prepared for trial and had its witnesses available. Appellee then took the deposition of one of its witnesses who was present at the place of trial (TR. 142) and proceeded to secure additional affidavits and put the record in proper condition for a summary judgment motion in order to dispose of the matter promptly and without a long delay.

The acting District Judge, in passing on the Motion

for Summary judgment had a record completely different from the record before the District Judge in passing upon the sufficiency of the complaint. At the time of the argument before the District Judge on the Defendant's motion to dismiss, plaintiff's counsel argued very strenuously that this case, so far as the Workmen's Compensation Act is concerned, is governed by certain cases, including the case of Glidden Rural Electric Co-operative vs. Iowa Employment Security Commission 236 Iowa 910, 20 NW 2d 435, and Bates vs. Connecticut Power Co. 130 Conn 256, 33 A 2d 342. The Glidden case was decided primarily on the basis that this particular rural co-operative had never constructed any lines of its own and had always contracted out all line construction. The Bates case was decided on the basis that a public highway where the accident occurred did not constitute premises under the company's control and therefore the Workmen's Compensation Act of Connecticut did not apply to this particular situation. The present record establishes beyond any doubt that the Washington Water Power Company does construct its own electric transmission lines and that the accident occurred on the premises of the Washington Water Power Company and not upon a public highway.

The deposition of Plaintiff's witness, Mr. Ed Raunig (TR. 97-122), the adverse deposition of defendant's witness Jack Inman (TR. 122-141), as well as the depositions of another member of the crew (TR. 142-159), also establish without denial and beyond question many other facts which are not and never have been refuted or denied in any way by appellant.

II

Appellants' allegations with respect to negligence are set forth in paragraph six of their complaint (TR. 4, 5). Ground (a) is that "prior to crossing the said 13,000-volt line above described, the deceased's employer requested the defendant to cut off the power of said electrical power line so that the crossing by the transmission line could be made in safety and that the defendant neglected, failed to (sic) refused to comply with said request." The allegation in the complaint as set forth is somewhat ambiguous; and in passing upon the sufficiency of the complaint the trial court gave every intendment in favor of the plaintiff.

Construing the record as now before the court in the light most favorable to Appellants, the facts with respect to this matter are that during the course of the job, after agreeing to make all crossings hot, the contractor requested informally that all lines be shut down while the crossings were made and that he brought the subject up just prior to the making of the crossing in question (TR. 104). The record shows that the Washington Water Power Company determined at the beginning of the job and all the way through the job that it could not shut down or kill the line in question because of the dependence of a great number of people upon the electric service supplied by this line. The customers existing on this line are detailed in the affidavit of Virgil Thompson (TR. 78-81). Appellants made no attempt to deny the facts set forth in the affidavit of Virgil Thompson other than to submit an affidavit of one of

their attorneys (TR. 86) which contains merely general statements that "the area served by this line was sparsely populated; that the packing plant was not operating; that the mines operating in the area were operating on a very limited basis on the date the accident occurred; the date the accident occurred fell on a Sunday and the line could have been de-energized with a minimum of inconvenience to the users of power in that area," (TR. 86).

Appellants also submitted an affidavit of Jack Inman containing a conclusion that the electricity could have been shut off on Sunday (TR. 89)—although in his deposition he stated that when a line is shut down for part of the operation, it is shut down for the whole operation (TR. 135); and further stated that the line was strung on Wednesday or Thursday (TR. 128). Affidavits must be made on personal knowledge. Flimsy or transparent charges or allegations are insufficient to state a justiciable controversy.

> Rule 56 (e), Federal Rules of Civil Procedure.
> *Sabin v. Home Owners Loan Corporation,* 151 F (2d) 541, cert. den. 66 Sup. Ct. 1011, 328 U. S. 840, 90 L. ed. 1615; Reh. den. 66 S. Ct. 1362, 328 U. S. 880, 90 L. ed. 1648.
> *Schreffler v. Bowles,* 153 F. (2d) 1; cert. den. 66 Sup. Ct. 1366, 328 U. S. 870, 90 L. ed. 1640.
> *U. S. v. Britten,* 161 F. (2d) 921.

Appellee moved to strike these affidavits. For the purposes of this argument, however, we may assume that all statements set forth in the affidavits which could possibly be construed as statements of fact are

true. Assuming that a few of the industrial customers were not operating or were not operating full force, the Power Company, as a public service company, would not be justified in shutting down power to the customers admittedly served by the line for the time required to make the crossing. The period involved is not just Sunday when the accident occurred, but also Thursday when the operation commenced. Appellants completely overlook that this work was being done for the benefit of the defendant; and whether it did this work with its own crews or through the medium of a contractor, if the Power Company should, for its own purposes, deprive a large group of people of electricity in order to perform a reconductoring operation, particularly where such work required a substantial period of shutdown and could be done without inordinate danger if properly done, it would be sadly remiss in its duty to the public. For the courts to permit a jury to find the Power Company guilty of negligence for doing what its duty to the public required it to do would not only be illogical but also highly unjust.

The case most closely in point on this matter is a recent case decided by the New York Court of Appeals: *Nicholas v. New York State Electric and Gas Corp.,* 308 NY 931, 127 NE 2d 84. See also same case, 127 NY Supp. 2d 490. The Court of Appeals affirmed the Supreme Court Appellate Division in a memorandum decision. The Appellate Division, in reversing a judgment entered upon a jury verdict for plaintiff, said:

> "Concededly, the defendant was required to exercise reasonable care to see to it that plaintiff was

> not injured while upon its premises. In considering its duty to exercise such care, we should not overlook that it was a public service corporation which was under a continuing duty to supply current to its customers." 127 NY Supp. (2d) at 497.

The second ground of negligence (b) "That the defendant, in violation of its duty at the time and place above mentioned, negligently failed to provide the deceased with a safe place in which to work," of course, merely states as a legal conclusion the more definite ground of negligence alleged in (a), which was the requirement of the Power Company that the crossing be made "hot." It was argued before the lower court, although appellant makes no mention in its brief, that the proprietor of a business or property owes to employees of contractors working on its premises the duty of furnishing them with a safe place in which to work. Plaintiff, however, neglected to consider the second part of this well-known rule, that the proprietor owes the duty to the employees of the contractors either to furnish a safe place in which to work or to give warning of the danger involved, ie. he must warn them of any hidden dangers. *Gagnon v. St. Maries Light and Power Co.,* 26 Idaho 87, 141 P. 88; *Deaton v. Board of Trustees of Elon College,* 226 NC 433, 38 SE 2d 561; *Storm v. New York Telephone Company,* 270 NY 103, 200 NE 659. The record is clear that the Contractor at all times knew that the crossing would be made hot. There is no question of a "hidden danger" involved in this case.

The third ground of negligence alleged by the plaintiff was "(c) That defendant with knowledge of the

dangerous condition existing in installation of the transmission line in close proximity to its power line, failed and neglected to install proper safeguards and take proper precautions to prevent contact with its power line." The work was being performed by an independent contractor. Appellant concedes—in fact they urge very strenuously,—that the contractor by whom Mr. Beedy was employed was an independent contractor. They do not allege, nor could they allege, that Contractor was not experienced in line construction. Plaintiffs' witness, Mr. Ed F. Raunig, who was superintendent of Contractor, admitted on cross-examination that he determined what type of guard structure to be used at a crossing and whether or not the guard structure should be used or would be used in a particular manner. (TR. 116). A guard structure had been erected at the crossing, which had it been properly used, would have prevented the accident. There is no allegation or contention that the Appellee had any knowledge that the guard structure wasn't being used, nor do any cases cited above or any cases of which we have knowledge go to the extent of holding that the proprietor of premises must carefully watch and actively prevent any of the contractor's employees from negligently injuring themselves where the danger is open and apparent and is as well known to the contractor and his employees as it is to the proprietor of the business.

While there were other accidents that had occurred on this job, there is no showing that these accidents were similar to the accident in which Mr. Beedy was killed, or that these accidents would be relevant except to ad-

vise the Power Company of a fact otherwise well known —that the electrical construction business is a hazardous business.

The proximate cause of the death of George Beedy was the negligence of the Contractor in not using the guard structure; in refusing to allow the lineman on the pole to snub off the line to prevent it from running down the hill; and in not using its telephone circuit to warn the workmen that the line was sagging into the distribution line. (TR. 120, 134, 148, 149, 150, 155). An employer is not bound to supervise the progress of contract work for the purpose of preventing the commission of collateral torts by the contractor. 27 Am. Jur. 513 (Independent Contractors Sec. 35), 18 ALR 801, et seq., 44 ALR 932, 949. The fact that the work is to be done under the general supervision of an agent for the employer, or that the employer inspected the work to see that it was performed according to contract, does not change the relation from that of independent contractor to that of mere servant. *Goble v. Boise-Payette Lumber Co.* 38 Idaho 525, 224 P. 439.

III

In any event, the record conclusively establishes that the defendant-appellee stood in the relationship of employer to Mr. George Beedy at the time of the accident. The facts with respect to this matter are clear and undisputed. The question of whether or not the Power Company is an employer under the Idaho Workmen's Compensation Act is a question of law. Certainly nothing is to be gained by having a jury trial prior to decid-

ing this very vital and important issue. The undisputed facts are:

1. That the Power Company is an electric utility company or public service company engaged in the generation, transmission, and distribution of electric power and energy. As such, it owns both transmission and distribution lines. The Power Company and all of the other major electric utility companies in Idaho maintain crews to construct both transmission and distribution lines. These companies also employ the services of independent contractors when their own crews are not able to handle the volume of work required by circumstances and the demand for expansion (TR. 66, 69, 70, 73, 76).

Under the terms of the contract between the Power Company and the Contractor, the Contractor was replacing certain materials, including conductors, on poles belonging to the Power Company. The materials were the property of the Power Company and were merely being put into place by the contractor (TR. 31).

The Idaho statutes involved are: Sec. 72-203 of the Idaho Code, which provides as follows:

> *Right to Compensation Exclusive.*—The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall include all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.
>
> Employers, who hire workmen within this state to work outside of the state, may agree with such

workmen that the remedies under this act shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment; and all contracts of hiring in this state shall be presumed to include such an agreement. (1917, ch. 81 Sec. 6, p. 252; reen. C. L. 256:6; C. S. Sec. 6219; I. C. A., Sec. 43-1003.)

Sec. 72-204 of the Idaho Code provides as follows:

Liability of Third Persons.—When an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this act, any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person: provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action. (1917 ch. 81, Sec. 7, p. 252; reen. C. L. 256:7; C. S., Sec. 6220; I. C. A., Sec. 43-1004.)

Sec. 72-811 of the Idaho Code provides as follows:

Contractors and subcontractors.—An employer subject to the provisions of this act shall be liable for compensation to an employee of a contractor or subcontractor under him or who has not complied with the provisions of section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or subcontractor shall also be liable for such compensa-

> tion, but the employee shall not recover compensation for the same injury from more than one party. The employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor for whom the employee was working at the time of the accident. This section shall be in force as to all contracts made subsequent to March 15, 1921. (C. S., Sec. 6287A as added by 1921, ch. 217, Sec. 19, p. 474; I. C. A., Sec. 43-1611.)

Sec. 72-1010 of the Idaho Code provides as follows:

> *Employer.* — "Employer," unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured it includes his surety so far as applicable. (1917, ch. 81, Sec. 110a, p. 252; reen. C. L. 256: 110a; C. S. Sec. 6320; I. C. A., Sec. 43-1806.)

It can be readily seen from the above-quoted Code sections that Appellants are barred in this action if the defendant in this case comes within the definition of "employer" as set out in Idaho Code Sec. 72-1010. It is obvious from this statute that there are two types of employer under the statute; one is a common-law employer, the other is the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on who has employed an independent contractor to perform his work for him. Appellant has confused the issue by citing, out of con-

text, language from Idaho cases where the Court was concerned with the first type of employer-employee relationship. There is, of course, no contention on the part of the Power Company that it was the common law employer of Mr. George Beedy. The discussion in appellants' brief, pp. 15, 17, and other places, relative to control as establishing the employer-employee relationship, is of course irrelevant so far as the issue of law here is concerned. The sole question is a very narrow issue, and that is whether or not the defendant (Appellee) was the owner or lessee of premises or other person virtually the proprietor or owner of the business there carried on, but who by reason of there being an independent contractor was not the direct employer of the workman involved. The contention of the appellee is that it definitely was the proprietor or operator of the reconductoring business being carried on on its premises.

The test to be applied to determine what is the business of the defendant and whether certain operations are part of its business is not entirely free from difficulty, it must be conceded. There have been many cases from different jurisdictions in the United States which have passed upon this problem. We could not review all of these cases in the limited space allowed in this brief, but there are three extensive annotations—50 ALR 872, 105 ALR 580, and 150 ALR 1214—which review many of the cases. It must be borne in mind, of course, that the Workmen's Compensation statutes vary from state to state; and when applying the decisions of other states to the law of Idaho, any differences in the Statute must

be observed. The cases, however, make it quite clear that each operation in each different type of business must be carefully analyzed.

In connection with the statutes, appellants have in this court and the court below attempted to create an entirely new test for determining what constitutes a person the proprietor of a business by asking the question whether or not the particular proprietor or owner of the business has engaged in performing the particular operation for others for hire. This of course would narrow the coverage of the statute to contractors and subcontractors and would completely eliminate principal owners and proprietors of businesses. While there are some states which have statutes specifically so drawn, to so restrict the Idaho statute is completely untenable.

One type of case which analyzes a statute similar to the Idaho statute is set forth at some length by appellants in their brief at page 21, the case of *Sears Roebuck and Co. v. Wallace,* 172 F 2d 802. In this case, Sears Roebuck hired an independent contractor to make alterations on its warehouse building. Of course, the owner of a warehouse conducts his business within that warehouse and may never touch it or perform any alterations on it from the time he moves in until the time he moves out. He seldom, if ever, has in his employ carpenters, steelworkers, and others who would perform the jobs involved in expanding, constructing, or altering a warehouse. Such an operation is wholly outside of the normal business performed by a warehouseman or by a retail or wholesale store.

The case of *Moon v. Ervin,* 64 Ida. 464, 133 P. 2d 933, cited by appellants in their brief, page 14, is a similar type of case although even more clearly a case where the Act would not apply. Certainly, no one would conceive that a person who employed a contractor to build a private home for him would be considered as being in the home-building business.

There are a number of Idaho cases construing the Idaho statute. These include *Modlin v. Twin Falls Canal Co.,* 49 Ida 199, 286 P. 612; *Hiebert v. Howell,* 59 Ida 591, 85 P. 2d 699; and *Gifford v. Nottingham,* 68 Ida. 331, 193 P. 2d 831. None of these cases is closely in point, nor are any of the Idaho cases very closely in point. However, the Idaho court in the case of *Gifford v. Nottingham,* 68 Ida. 331, 193 P. 2d 831, at P. 835, sets forth the test of what constitutes an employer under the statute in the following words:

> "Did the work being done pertain to the business, trade, or occupation of the defendant carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability."

The court was in this instance speaking of liability for compensation under the Act.

The case of *Gifford v. Nottingham,* however, is also the only Idaho case which by any stretch of reasoning could be construed as favoring the plaintiff's contention in this matter. In the case of *Gifford v. Nottingham,* the Court stated by way of dictum that the city is not in effect the owner or proprietor of the business of digging

sewers. This matter, we are sure, was considered in the case very casually and with very little thought. As a matter of fact, it was completely unnecessary to the decision. The city in that case was not a party to the action and its liability was irrelevant.

Idaho Code, Sec. 72-811 provides in part:

> "The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party."

Clearly under the statute, the defense of the contractor in the particular case, that the city was the proprietor of the business and therefore the contractor was not liable for compensation was completely irrelevant and should have been disposed of on that ground. However, even if we consider that this dictum is an expression of the Idaho Supreme Court that a city is not in the business of digging sewers, there is certainly a wide distinction between a city digging sewers and an electric utility company reconductoring its transmission lines. Cities clearly aren't in the business of constructing sewers for pecuniary gain; on the contrary, sewers are constructed out of tax or assessment money purely as a public service and certainly not with any thought of any pecuniary gain. In addition, while it is doubtful that any evidence was introduced on this point, it might easily have been assumed by the Idaho Supreme Court that generally speaking, cities do not dig sewer trenches and install sewer pipe by means of their own employees; rather such jobs are, as a general rule, contracted out to independent contractors.

In order to resolve this question, it is necessary to consider very carefully the nature of the electric utility business and consider decisions from other states having like statutes concerning the status of public utilities. An electric utility company constructs power plants or purchases wholesale electricity from other sources. It constructs, owns, and operates heavy transmission lines running from one city to another or from one area to another; it owns and operates secondary distribution lines of medium voltage which run to different sections of the city or smaller sections of the countryside. It also builds, owns, and operates smaller distribution lines which lead into private homes or businesses. Once a customer is connected up, he merely pushes a button in order to receive service from the electric utility. An electric utility company receives payment from its customers depending upon the amount of electricity so used, it is true; but under public service regulation, applicable in Idaho and nearly all states of the United States at the present time, the earnings or profits of the electric utility depend upon the allowance by a Public Utilities Commission of a reasonable rate of return on property in which the utility has invested. From this standpoint, it is wholly different from an ordinary factory which fabricates machinery or other types of merchandise and ships it out into the channels of commerce to be sold to some ultimate customer. If a utility builds new facilities, it is then entitled to earn more money. So long as the electric transmission lines—both primary, secondary, and distribution—are maintained and in good working order, and so long as they are expanded to

take care of the needs of potential customers, the product of the utility is automatically delivered.

Consequently, the main business of utilities is constructing and maintaining their lines so that the consumer will be able to receive service by pushing a button. Electric utilities, with very rare exceptions, maintain crews of linemen who construct, repair, and maintain the transmission lines upon which the business of the utility company depends. Only when their own crews are completely occupied and the volume of work is greater at a particular season of the year or a particular time than their crews can handle, do they contract out such work.

The cases which have been decided in the different states have universally recognized that the construction of transmission lines and the construction of the plant facilities of the company are part of the trade or business of a utility. Appellant cites four cases in this brief (Br. 24, 25). The first of these—*Glidden Rural Electric Co-op v. Iowa Employment Security,* 236 Iowa 910, 20 NW 2d 435—has been mentioned very briefly before. In this case the statute referred to the "usual" business. In order to arrive at a decision holding that the construction was not within the usual scope of business of the co-operative, the Court discussed the term "usual" for three pages and laid great stress on the fact that in the case of this electrical co-operative, construction work was and had been uniformly delegated to a contractor. This was a 5-4 decision and the dissenting opinion is very compelling in its reasoning, and in particular its

position that the majority opinion does not constitute a liberal construction of the statute. The majority opinion might also be questioned because it makes the determination under the statute a subjective rather than an objective one based on standards in an industry. However, since the word "usual" does not appear in the Idaho statute, the inference can be readily drawn that had the Iowa statute been couched in the same terms as the Idaho statute, the decision would have been different. Finally, since the Power Company in the present case does do and regularly has done a large proportion of its line construction work, the result in the present case would be favorable to the Power Company if the reasoning of the Glidden case were applied to this controversy. (This case did involve an employment security statute rather than workman's compensation statute, but it is an application of a similar definition of "employer.")

The case of *Bates v. Connecticut Power Company,* 130 Conn. 256, 33 A 2d 342, is cited by Appellants (App. Br. 25) as sustaining their contentions in this matter. On the contrary, the holding in the case is directly opposed to the contentions of the plaintiffs. The Court found that the construction of transmission lines was part of the business of the utility, but under the Connecticut act it was required that the accident occur on the *premises* under the company's control. The Idaho statute is not quite so specific about the matter of the accident having occurred on the premises of the employer. On the contrary, no Idaho case has made such a distinction and the Idaho cases have repeatedly cited

O'Boyle v. Parker-Young Co., 95 Vt. 58, 112 A. 385, where under an almost identical statute the act was held to apply even though the accident occurred on a bridge on a public highway. In any event, however, it is conceded that in the instant case the accident occurred on the premises of the Power Company; and under the rule of the Bates case, the judgment in this case should be sustained.

The case of *Jones v. Florida Power Company* (Cited on p. 24 of appellant's brief) is of no assistance in deciding the present controversy. A reading of that case and the cases cited therein shows that the statute interpreted there bears no resemblance to the Idaho statute.

The case of *Pittsburgh Plate Glass Co. v Carey,* 98 F. 2d 533, cited on p. 25 of appellant's brief, is also of no assistance. It does not involve utility construction at all. It is a case involving two contractors working on a building where the employees of one gave the employees of another a hand in the construction.

The case of *Iowa-Illinois Electric Co. v. Industrial Commission, el al,* cited on p. 25 of appellants' brief, is also of little help. The statute involved is considerably different from the Idaho statute. In fact, under the Illinois statute being construed in that case, there would be no question that the decedent in the present case would clearly fall within the coverage of the workmen's compensation act. The case, in fact, involved a window washer who was washing the windows on the outside of an office building, part of which was being leased by the utility company.

On the other hand, every case which we have been able to find and which apparently the appellants have been able to find involving actual utility construction has unanimously held that utility construction is part of the business carried on by a utility company. We have already discussed the two cases cited by appellants in their brief. In addition to these cases are the cases of *Chicago and E. R. Co., v. Kaufman,* 78 Ind. App. 474, 133 NE 399, involving a construction contractor for a railroad company; *Lessley v. Kansas Power and Light Co.* 171 Kans. 197, 231 P. 2d 239, involving a contractor erecting new buildings and installing steam boiler turbines, generators, etc., for a power company, which case is followed in similar cases in *Primm v. Kansas Power and Light Co.,* 173 Kans. 443, 249 P. 2d 647, and *Sheahan v. Kansas Power and Light Co.,* 172 Kans. 399, 241 P. 2d 515. Also the case of *Williams v. Cities Service Gas Co.,* 139 Kans. 166, 30 P. 2d 97, which involved a contractor engaged to dig a ditch on a gas company's right-of-way for extension of a gas line; and *Marchbanks v. Duke Power Co.,* 197 N.C. 356, 2 SE 2d 825, which involved a contractor painting power poles for an electric utility company.

CONCLUSION

Appellants in their conclusion (BR. 26-27) refer to the inadequacy of the compensation under workmen's compensation act, which of course is not a matter before the Court. The tenor of their brief is to the effect that to hold that this employee of a contractor for the power company was under the workmen's compensa-

tion would be a restrictive interpretation of the statute or a strained construction of the statute. Had this been a case where a power company had been irresponsible and hired a contractor who had not qualified under the workmen's compensation act, and had the power company denied its liability under the workmen's compensation act, then it would be quite evident that the appellants in this case would be claiming that to allow the power company to escape its obligations under the workmen's compensation act by employing an irresponsible independent contractor would be unthinkable. In such a conclusion, however, we would be constrained to agree.

The purpose of the workmen's compensation act was to make certain that workmen killed or injured in the performance of their duty in an industry would be compensated regardless of negligence; and in order to prevent any industry or employer in an industry from avoiding or evading this responsibility, the statute defining employer was made much broader than the ordinary common law definition of employer. The record in this case with the facts and figures set out—not just conclusions as stated by appellants—show conclusively that the reconductoring of transmission lines is part of the ordinary business of a utility company which it normally performs for itself; that to allow a utility company to contract out this work and escape the responsibility under the workmen's compensation act would be contrary to the obvious and evident intent of the statute. As an incident to this obligation and this

responsibility, there follows an immunity from ordinary civil suits.

We respectfully submit that the action of the acting District Judge granting summary judgment was proper and the judgment should be affirmed.

Respectfully submitted,

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